IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TONY L. STRODE, Petitioner.	)	No. 80849-0 En Banc Filed October 8, 2009

ALEXANDER, C.J.—We have plainly articulated the guidelines that every trial court must follow before it closes a courtroom to the public. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). In the *Bone-Club* case, we held that a courtroom may be closed to the public only when the criteria for closure identified in that case are satisfied. Here, the trial court violated Tony Strode's right to a public trial by conducting a portion of jury selection in the trial judge's chambers in unexceptional circumstances without first performing the required *Bone-Club* analysis. This is a structural error that cannot be considered harmless. Therefore, reversal of Strode's conviction and remand for a new trial is required.

I

Tony L. Strode was charged in Ferry County with first degree rape of a child, first degree attempted rape of a child, and first degree child molestation. A jury trial on the

charges commenced on July 10, 2006. Because the case against Strode centered on allegations that Strode had sexual contact with a child, prospective jurors were given a confidential juror questionnaire to complete. In it they were asked whether they, or anyone close to them, had either been the victim of sexual abuse or accused of committing a sexual offense. Those who answered "yes" to either question were called one at a time into the judge's chambers for questioning on the issue of whether their past experiences would preclude them from rendering a fair and impartial verdict in the case. The trial court conducted this form of individual voir dire for at least 11 prospective jurors.[1] Counsel for the State and Strode have both acknowledged in their briefing that the record is devoid of any indication that the trial judge held a *Bone-Club* hearing prior to these interviews being conducted in chambers.

The only persons present during the individual questioning of the 11 prospective jurors were the trial judge, prosecuting attorney, defense counsel, and the defendant. In questioning some of these prospective jurors, the judge alluded to the fact that the questioning was being done in chambers for "obvious" reasons, to ensure confidentiality, or so that the inquiry would not be "broadcast" in front of the whole jury panel. Verbatim Report of Proceedings (VRP) (July 10, 2006) at 5, 10, 12, 20, 26, 34, 37. During this process, the trial judge and counsel for both parties asked questions of the potential jurors about their backgrounds, based on their answers to the questionnaire. Challenges for cause were registered in chambers and either granted

[1]It is possible that more than 11 prospective jurors were interviewed in chambers, but this is not clear from the record since it appears that the trial court's recording device either malfunctioned or was turned off.

or denied following the examination of each of these prospective jurors. As a result of this interview process, 6 of the 11 prospective jurors were excused for cause. The remainder were returned to the jury pool for the continuation of jury selection in open court. The trial judge then called the entire remaining jury pool into the courtroom, administered an oath to the jury, and voir dire continued.

At the conclusion of the trial, the jury convicted Strode of all of the charges against him. Strode appealed his convictions to the Court of Appeals, Division Three. That court transferred the appeal to the Washington Supreme Court, and we accepted review.

II

Whether a defendant's constitutional right to a public trial has been violated is a question of law, subject to a de novo review on direct appeal. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

III

Strode contends that the interviewing of potential jurors in the trial judge's chambers violated his constitutional right to a public trial as guaranteed by the state and federal constitutions. The State responds that the trial was not closed to the public because "[t]he interviews took place prior to the commencement of the trial." Resp't's Br. at 6. The State also submits that even though the trial court did not engage in a *Bone-Club* analysis before closing a portion of the trial to the public, the rationale for the courtroom closure can be found in the record. In addition, the State contends that

because Strode and his attorney were present during this individual questioning, Strode waived his right to argue that his right to a public trial had been violated. Finally, the State maintains that even if the interviews of prospective jurors in chambers is deemed an unjustified closure of a public trial, the violation was insignificant and did not infringe on Strode's constitutional right to a public trial.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." Article I, section 22 of the Washington Constitution similarly guarantees that "i[n] criminal prosecutions the accused shall have the right . . . to have a . . . public trial." The Washington Constitution also provides in article I, section 10 that "[j]ustice in all cases shall be administered openly." We have concluded that this latter provision in our state constitution affords "the public and the press the right to open and accessible court proceedings." *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006) (citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982)).

The public trial right protected by both our state and federal constitutions is designed to "ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *Brightman*, 155 Wn.2d at 514 (citing *Peterson v. Williams,* 85 F.3d 39, 43 (2d Cir. 1996) (citing *Waller v. Georgia,* 467 U.S. 39, 46-47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984))). Consistent with those purposes, the United States Supreme Court has stated that public trials embody a "'view of human nature, true as a general rule, that judges,

lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.'" *Waller*, 467 U.S. at 46 n.4 (quoting *Estes v. Texas*, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring)). While the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. *Easterling*, 157 Wn.2d at 174-75.

A

The State asserts that the trial was not closed to the public because the interviews of prospective jurors that took place in chambers occurred prior to the commencement of trial. This argument fails. The guaranty of open proceedings extends in criminal cases to "'[t]he process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). In this regard, we have expressly noted that "a closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals." *Brightman*, 155 Wn.2d at 515 (citing *Orange*, 152 Wn.2d at 812).[2]

Here, as noted above, the questioning of at least 11 prospective jurors took place in the judge's chambers, and 6 of them were challenged for cause. This process

[2]We note, also, the provision in our state constitution that provides that victims of crimes have the right to "attend trial and all other court proceedings the defendant has the right to attend." Wash. Const. art. I, § 35.

was closed to the general public. The trial judge's decision to allow this questioning of prospective jurors in chambers was a courtroom closure and a denial of the right to a public trial.

B

Notwithstanding the lack of *Bone-Club* analysis by the trial court, the State urges this court to consider the *Bone-Club* factors on appeal and hold that the record demonstrates closing a portion of the jury voir dire to the public was justified. The presumption that trials should be open may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Orange*, 152 Wn.2d at 806 (quoting *Waller*, 467 U.S. at 45 (quoting *Press-Enter.*, 464 U.S. at 510)). To assure careful, case-by-case analysis of a closure motion, a trial court faced with the question of whether a portion of a trial should be closed must ensure that the following five criteria are satisfied:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
> 4. The court must weigh the competing interests of the proponent of closure and the public.
> 5. The order must be no broader in its application or duration than

necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (citing *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). "Thus, in order to support full courtroom closure during jury selection, a trial court must engage in the *Bone-Club* analysis; failure to do so results in a violation of the defendant's public trial rights." *Brightman*, 155 Wn.2d at 515-16 (citing *Orange*, 154 Wn.2d at 809). When the record "lacks any hint that the trial court considered [the defendant's] public trial right as required by *Bone-Club*, [the appellate court] cannot determine whether the closure was warranted." *Id.* at 518 (citing *Bone-Club*, 128 Wn.2d at 261).

As noted above, there is no indication in the record that the trial judge engaged in the required *Bone-Club* analysis or made the required formal findings of fact and conclusions of law relevant to the *Bone-Club* criteria. Although the trial judge mentioned several times that juror interviews were being conducted in private either for "obvious" reasons, VRP (7/10/06) at 5, 10, 12, 26, 34, 37, to ensure confidentiality, or so that the inquiry would not be "broadcast" in front of the whole jury panel, *Id.* at 20, 30, the record is devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right.

The determination of a compelling interest for courtroom closure is "the affirmative duty of the trial court, not the court of appeals." *Bone-Club*, 128 Wn.2d at 261. Nor is it the responsibility of this court to speculate on the justification for closure. Moreover, even if the trial court concluded that there was a compelling interest favoring

closure, it must still perform the remaining four *Bone-Club* steps to thoroughly weigh the competing interests. *Id*. (citing *Eikenberry*, 121 Wn.2d at 212). As far as we can tell, the trial court did not consider whether there were less restrictive alternatives to closure available. Unfortunately, the absence of any record showing that the trial court gave any consideration to the *Bone-Club* closure test prevents us from determining whether conducting part of the trial in chambers was warranted. *See Brightman*, 155 Wn.2d at 518.

C

The State also asserts that Strode invited or waived his right to challenge the closure when he acquiesced, without any objection, to the private questioning of jurors. However, the public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal. *Easterling*, 157 Wn.2d at 173 n.2; *see also Brightman*, 155 Wn.2d at 514; *Orange*, 152 Wn.2d at 800; *Bone-Club*, 128 Wn.2d at 257. We have held that a "defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver." *Brightman*, 155 Wn.2d at 517 (citing *Bone-Club*, 128 Wn.2d at 257). Strode's failure to object to the closure or his counsel's participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial.[3]

[3]The right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner. *See City of Bellevue v. Acrey*, 103 Wn.2d 203, 207-08, 691 P.2d 957 (1984) (waiver of the jury trial right must be affirmative and unequivocal).

Additionally, Strode cannot waive the public's right to open proceedings. As we observed in *Bone-Club*, the public also has a right to object to the closure of a courtroom, and the trial court has the independent obligation to perform a *Bone-Club* analysis. The record reveals that the public was not afforded the opportunity to object to the closure, nor was the public's right to an open courtroom given proper consideration.[4]

D

The State's final argument is that even if the interviewing of prospective jurors in chambers is deemed an unjustified closure, the violation was insignificant and did not infringe the constitutional right to a public trial. Some courts in other jurisdictions have held that there may be circumstances where the closure of a trial is too trivial to implicate one's constitutional right. *United States v. Ivester*, 316 F.3d 955 (9th Cir. 2003). Trivial closures have been defined to be those that are brief and inadvertent. *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994); *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975). This court, however, "has never found a public trial right violation to be [trivial or] de minimis." *Easterling*, 157 Wn.2d at 180. Furthermore, the closure here was analogous to the closures in *Bone-Club* and *Orange*. *Orange*, 152

[4]The concurring justice asserts that any discussion of the public's right to open trials conflates the rights of the defendant and the public because a defendant should not be able to assert the rights of the public or press. Strode has not asserted any rights belonging to the public or press concerning public trials. We address the right of the public because courts have the overriding responsibility to ensure that the public's right to open trials is protected. This responsibility is laid out in the fourth *Bone-Club* criterion.

Wn.2d at 804-05; *Bone-Club*, 128 Wn.2d at 259. As we have stated above, the trial court and counsel for the State and Strode questioned at least 11 prospective jurors in chambers. At least 6 of those prospective jurors were subsequently dismissed for cause during this period. This closure cannot be said to be brief or inadvertent.[5]

IV

In determining the remedy in this case, we note that "[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis." *Easterling*, 157 Wn.2d at 181 (citing *Neder v. United States,* 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed .2d 35 (1999) (citing *Waller*, 467 U.S. 39)). This is so because denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed. *Neder*, 527 U.S. at 8 (citing *Waller,* 467 U.S. 39); *Easterling*, 157 Wn.2d at 181 (citing *Bone-Club*, 128 Wn.2d at 261-62 (citing *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923))). This court in *Orange* concluded that by improperly closing the courtroom during voir dire "the remedy for the presumptively prejudicial error [was], as in *Bone-Club*, remand for a new trial." *Orange*, 152 Wn.2d at 814.

[5]The dissent attempts to justify the trial court's closure of voir dire, and in the process makes several errors of analysis. First, the competing interests are not the defendant's right to an impartial jury weighed against the right to a public trial. Rather, the public trial right is weighed against the trial court's preference for conducting individual questioning in chambers. Second, whether or not the defendant benefited from closure says nothing of the public's right to open trials guaranteed by article I, section 10 of our state constitution. Third, the dissent does not explain why the only alternative to protecting juror privacy was in-chambers questioning, as opposed to individual questioning in the courtroom. Fourth, the merit of the closure is not the issue. Instead, we focus only on the procedure used by the trial court prior to closure.

By conducting a portion of the trial (jury voir dire) in chambers without first weighing the factors that must be considered prior to closure, prejudice to Strode is presumed. This error cannot be considered harmless and, therefore, Strode's convictions are reversed, and the case is remanded for a new trial.

AUTHOR:
Chief Justice Gerry L. Alexander

WE CONCUR:

Justice Susan Owens

Justice Richard B. Sanders

Justice Tom Chambers